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# Report on Obsolete Remedies Against Estate Property: *Estate Administration Act*, Part 9

LAW REFORM
COMMISSION OF
BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

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# LAW REFORM COMMISSION OF BRITISH COLUMBIA

## REPORT ON OBSOLETE REMEDIES AGAINST ESTATE PROPERTY: *ESTATE ADMINISTRATION ACT*, PART 9

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To the Honourable Brian R. D. Smith, Q.C.,
Attorney General of the Province
of British Columbia

The Law Reform Commission of British Columbia has the honour to present the following:

# REPORT ON OBSOLETE REMEDIES AGAINST ESTATE PROPERTY: *ESTATE ADMINISTRATION ACT*, PART 9

The *Estate Administration Act*, in sections 122 to 132, sets out what purport to be rules of law in relation to the administration of estates. These provisions are mainly drawn from an English statute of 1830 and retain the language and flavour of that time. They refer to a number of legal concepts that have little contemporary relevance.

Our research indicates that these provisions were aimed at correcting a problem which ceased to exist over 60 years ago and their continued retention is unnecessary and unjustified. We recommend that these and related provisions be repealed.

## A. Administration of Estates

A person may make a will to determine who is to receive his property on his death. If he dies without a will, the law must provide for the distribution of his estate. Distribution in that case is called "intestate succession."

In either case, the deceased's property vests in his personal representative who, depending on the circumstances, may be called an administrator, executor, or trustee. The personal representative uses the estate to pay the deceased's debts and liabilities, and then transfers the remaining property to those entitled under the deceased's will or by statute.

Legislation governs many aspects of the administration of a deceased's estate. Three statutes of particular significance are the *Estate Administration Act*,[1] the *Trustee Act*[2] and the *Law and Equity Act*.[3]

## B. Part 9 of the *Estate Administration Act*

Part 9 of the *Estate Administration Act* is entitled "Rules of Law Relating to the Administration of Estates." The sections in Part 9 are derived from English legislative reforms introduced between 1677 and 1869. They deal generally with the rights of creditors against recipients of a deceased's real property. For the most part, they are incomprehensible to the modern reader. That is because they address aspects of the law of succession and administration which have long been obsolete in British Columbia.

The following chapters examine the operation of the provisions contained in Part 9 of the *Estate Administration Act*, together with related legislation.[4] This examination involves some discussion of the former law governing the administration of estates.

Part 9 of the *Estate Administration Act* is to be found in Appendix A to this Report. Notes in the Appendix detail each section's purpose and legislative history. Other provisions discussed in this Report are to be found in Appendices B, C, D and E.

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[1] R.S.B.C. 1979, c. 114. Portions of this Act have their roots in provisions enacted over a span of seven centuries. The two oldest provisions, ss. 4 and 65, are derived from the *Statute of Westminster the Second, 1285*, 13 Edw. 1. Section 83 dates from the reign of Elizabeth I: *An Act against fraudulent Administration of Intestates Goods*, (1601) 43 Eliz. I, c. 8.

[2] R.S.B.C. 1979, c. 414.

[3] R.S.B.C. 1979, c. 224.

[4] Sections 83 and 84 of the *Trustee Act*, *supra*, n. 2 and s. 11 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224.

# CHAPTER II CREDITORS' REMEDIES AGAINST A DECEASED'S REAL PROPERTY

## A. Introduction

Part 9 of the *Estate Administration Act* provides the deceased's creditors with direct rights against the recipients of the deceased's real property. There are no modern cases dealing with Part 9, and it may be wondered why there is any need for these sections. A deceased's property vests in his personal representative, who is under a duty to satisfy the deceased's debts and liabilities from that property.[1]

The vesting of all of a deceased's property in his personal representative, however, is of relatively recent origin. That position was achieved by legislation enacted in the 1920's.[2] The former law was quite different and, unless a creditor could look to the recipient of a deceased's property, he was often without a remedy.

## B. Succession Before the 1920's

Under the former law, different rules applied to the distribution of real and personal property. Personal property vested in the deceased's personal representative.[3] The designation "personal representative" arose because that person represented the deceased with respect to his personal property. The personal property was used to satisfy the deceased's debts and liabilities. The remaining personal property was then transferred to the persons entitled to it under the deceased's will or by intestate succession.[4]

Real property did not vest in an intermediary for the payment of debts and liabilities. It passed directly to the person named in the will.[5] Real property not disposed of by will passed directly to the deceased's heir.[6] This presented problems for a creditor of the deceased unless he could proceed against the recipient of the deceased's real property. A creditor's rights in this respect were very limited.

At common law, there were only two circumstances where a creditor could have access to a deceased's real property to satisfy a debt. First, the creditor had

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[1] A personal representative remains personally liable after distribution of an estate for debts of the deceased which have not been paid. Since 1859, however, a personal representative may protect himself against liability by advertising for estate creditors: *Trustee Act*, R.S.B.C. 1979, c. 414, s. 38, derived from *Law of Property Amendment Act, 1859*, 22 & 23 Vict., c. 35, s. 29 ("Lord St. Leonard's Act"). The *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 82 provides a method for a personal representative to protect himself from liability under a lease or agreement for lease.

[2] *Land Registry Act*, S.B.C. 1921, c. 26, ss. 26-29. These sections were consolidated in 1924 as part of the *Administration Act*, R.S.B.C. 1924, c. 5, ss. 8(2), 106-109 and are now *Estate Administration Act*, *supra*, n. 1, ss. 6(2), 90-93. Section 91(4) of the current *Estate Administration Act* was introduced by the *Land Registry Amendment Act, 1925*, S.B.C. 1923, c. 31, s. 3. A few minor differences in the treatment of real and personal property are provided for in s. 90(3) of the *Estate Administration Act*.

[3] At common law, if the deceased left a will naming an executor, the personal property passed immediately on the deceased's death to him. If no executor was named, or the deceased died intestate, the court appointed an administrator to administer the estate. Until the appointment was made, the personal property temporarily vested in the local bishop because grants of probate and letters of administration were issued by the ecclesiastical courts. In the mid-nineteenth century, legislation created the Court of Probate. Since then, the personal property of an intestate vests temporarily in the Court of Probate: *The Court of Probate Act, 1858*, 21 & 22 Vict., c. 95, s. 19, now replaced by the *Administration of Estates Act, 1925*, 15 Geo. 5, c. 23, s. 9; *see Estate Administration Act*, *supra*, n. 1, s. 3.

[4] At common law, rules were developed to determine who was entitled to succeed to the property of a person who died intestate. Because various courts had jurisdiction to determine rights of succession, the rules which were developed to determine successors varied depending on the nature of the property concerned. The descent of real property was determined by the courts of common law. Persons entitled to an intestate's real property were called his "heirs." The distribution of personal property was within the jurisdiction of the ecclesiastical courts, which developed rules modelled on the civil law. Persons entitled to an intestate's personal property were called his "next of-kin." Today, when a person dies without making a will, Part 7 of the *Estate Administration Act*, *supra*, n. 1, defines who is entitled to his property, and no distinction is drawn depending upon whether his estate consists of real or personal property. *See Report on Statutory Succession Rights*, (LRC 70, 1983) 6; Megarry & Wade, *The Law of Real Property*, (4th ed., 1975) 519-22.

[5] *See Re Klaukie's Will*, (1873) 1 B.C.R. 76, 82 *per* Gray, J.

[6] *See Peck* v. *Sun Life Assurance Co. of Canada*, (1905) 11 B.C.R. 215, 220 (Full Court) *per* Duff J. For the rules identifying the deceased's heir, *see* Megarry & Wade, *supra*, n. 4; *Inheritance Act, 1833*, 3 & 4 Will. 4, c. 106. For the rules applied in British Columbia immediately prior to the abolition of descent to heirs, *see Administration Act*, R.S.B.C. 1924, c. 5, ss. 110-129. Usually, the intestate's heir was his eldest son.

some rights where an heir received real property from the deceased debtor on an intestacy. In that case, if the deceased died owing a specialty debt binding on his heirs,[7] the heir was liable for it.[8] The concept of a "specialty debt" has little modern significance. It refers to a bond, mortgage or debt secured under seal.[9] Other kinds of debts, arising from a loan or a contract, are called "simple debts." A creditor who was owed a simple debt could not proceed against the deceased's heir. Moreover, if the deceased left his property to a person by will, none of his creditors could proceed against the recipient of the property.

Second, creditors had some rights in equity. The courts of equity had jurisdiction over "equitable assets." The concept of equitable assets is now obsolete. Whether an asset was legal or equitable did not depend upon whether the interest was legal or equitable. An "equitable asset" is generally defined, unhelpfully, as "assets which could only be made available to creditors in a court of equity, as opposed to legal assets, which could be made available in a court of law."[10] For example, the common law courts did not recognize the ability of a married woman to own separate property. The courts of equity, however, would recognize such ownership. This property, consequently, could be reached only through a court of equity and was therefore an equitable asset.[11] If the deceased's will provided that his land was subject to the payment of debts, the land became an equitable asset.[12] All of a deceased's creditors were permitted equal access to equitable assets.[13]

## C. Early Legislative Reform

In many cases, a creditor was unable to recover his money even though the deceased debtor had owned land worth more than his debts. If parliamentary expressions of concern are to be accepted at face value, seventeenth century England suffered a nationwide epidemic of debtors hoping to use their eventual death as a means of defeating creditors. The 1623 *Act for the Relief of Creditors against such Persons as die in Execution* described the problem as follows:[14]

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[7] A provision commonly found in deeds or agreements provides that each party's obligations are also binding on his "heirs, executors, administrators or assigns." A provision of this nature is to ensure that a party cannot avoid obligations by assignment and, in the event of the party's death, his successors in interest will be answerable. It is uncertain to what extent this provision can bind an assignee of a party's interest. When a party dies, however, there is no doubt that this provision will ensure that his estate remains liable. The reference to "heirs" has no contemporary significance, unless it is being used in a non-technical sense embracing any person beneficially entitled to property vested in the deceased's personal representative. Nevertheless, the *Land Transfer Form Act*, R.S.B.C. 1979, c. 221 retains this formulation: *see, e.g.*, Schedule 2, clause 8. Until 1833, however, if a creditor wished to assert rights after his debtor's death, it was essential that the document recording the obligation provide that it was binding on the debtor's heirs. It is curious that this formulation only assisted a person seeking to enforce a specialty obligation.

[8] Unless the heir had disposed of the land: *see Creed* v. *Colville*, (1683) 1 Vern. 17, 23 E.R. 395; *Pran* v. *Colt*, (1674) 2 Freeman 139, 22 E.R. 1114; and *Davy* v. *Pepys*, (1572) 2 Plowd. 438, 75 E.R. 638 (C.B.). In equity, the heir was still liable, even if he had disposed of the land: *Coleman* v. *Winch*, (1721) 1 P. Wms. 775, 24 E.R. 609, 610 *per* Lord Macclesfield. The extent of an heir's liability also depended upon his pleadings in the action brought by the creditor. If he admitted both that he was liable to the creditor, and had inherited land, the creditor could execute his judgment only against the inherited property: *Davy* v. *Pepys*. If the heir falsely denied either fact, the creditor could execute his judgment against all of the heir's property as well as have the heir imprisoned: *Davy* v. *Pepys* at 660-661. This common law rule was later modified by s. 6 of the *Act for Relief of Creditors against Fraudulent Devises*, (1691) 3 & 4 Will. & Mar. 4, c. 14 (now s. 129 of the British Columbia *Estate Administration Act*): *see Redshaw* v. *Hester*, (1695) 5 Mod. 119, 122, 87 E.R. 557, 559, Carthew 353, 90 E.R. 806 (K.B.); *Davy* v. *Pepys* at 660-661.

[9] *Jewitt's Dictionary of English Law*, (1977) 1683. *See R.* v. *Williams*, [1942] A.C. 541, 555 (J.C.P.C.).

[10] *Jewitt's Dictionary of English Law*, (1977) 709. *See also Cook* v. *Gregson*, (1856) 3 Drew. 547, 61 E.R. 1012; *Plunket* v. *Penson*, (1742) 2 Atk. 290, 26 E.R. 577, 579, *per* Lord Hardwicke. *See also* Halsbury, *The Laws of England*, (1st ed., 1910) vol. 14, "Executors and Administrators," 244-6, vol. 13 "Equity," 33-4.

[11] *Re Poole's Estate*, *Thompson* v. *Bennett*, (1877) 6 Ch. D. 739, 743.

[12] *See Bailey* v. *Ekins*, (1802) 7 Ves. Jun. 318, 32 E.R. 130; Halsbury, *Laws of England*, *supra*, n. 10, vol. 13, 34, n. (p).

[13] Authority supports this proposition where property was charged with the payment of debts: *ibid.* It is uncertain, however, whether in other cases involving "equitable assets" all creditors had access to them in equity.

[14] 21 Jac. 1, c. 24. Until the enactment of the predecessor of s. 101 of the *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, the 1623 Act was probably part of the received law of British Columbia. The parliament of 1623 seems to have been greatly concerned with upholding morality. Other statutes in the same year dealt with the problems of drunkenness (c. 7), profane swearing and cursing (c. 20) and the murder of bastard children by their lewd mothers (c. 27).

> . . . forasmuch as daily Experience doth manifest, that divers Persons of Sufficiency in Real and Personal Estate, minding to deceive others of their just Debts for which they stood charged in Execution, have obstinately and wilfully chosen rather to live and die in Prison than to make any Satisfaction according to their Abilities. . .

Between 1677 and 1869, legislation was enacted in England to enhance creditors' rights on the death of a debtor. It is useful to observe that none of the problems arising with respect to real property arose with respect to personal property. Vesting the deceased's personal property in his personal representative for the payment of debts and liabilities fully protected creditors. Assimilating the administration of land to that of personal property would have been an effective solution. That step, however, was not taken in England[15] until 1897 and in British Columbia[16] until 1921.

Instead, legislative reform focused on granting rights to creditors against the recipient of property. It did that by amending the law where creditors had no rights against the recipient of property, to parallel the creditor's ability to proceed against the heir on a specialty debt. The statutes which primarily achieved these reforms were the *Statute of Frauds, 1677*,[17] *An Act for the Relief of Creditors against Fraudulent Devises*, (1691),[18] the *Debts Recovery Act, 1830*,[19] the *Administration of Estates Act, 1833*[20] and the *Administration of Estates Act, 1869*.[21]

An initial reform allowed a creditor who was owed a speciality debt to proceed against an equitable interest in real property received by an heir on an intestacy.[22] A more significant change permitted specialty creditors to proceed against a person receiving land under a will.[23] These reforms are embodied in sections 123-127, 129 and 131 of the British Columbia *Estate Administration Act*.[24]

One sweeping reform, introduced in 1833, extended the remedies available to creditors in equity. It was mentioned that creditors could look to the deceased's "equitable assets." The 1833 legislation made freehold and copyhold land available as equitable assets for the payment of simple and specialty debts.[25] Section 122 of the *Estate Administration Act* is based on this English legislation.

Another major change removed the priority for specialty debts, so that any creditor could proceed against the recipient of a deceased's property and all unsecured claims ranked equally.[26] This reform is reflected in sections 122

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[15] *Land Transfer Act, 1897*, 60 & 61 Vict., c. 65.

[16] *Supra*, n. 2.

[17] 29 Car. 2, c. 3.

[18] 3 & 4 Wil. & Mar., c. 14. This statute later received the short title of *Fraudulent Devises Act, 1691*. The preamble to it described the problem as follows:

> . . . it hath often so happened that where several persons having by bonds or other specialties bound themselves and their heirs, and have afterwards died seized in fee-simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have to the defrauding of such their creditors, by their last wills or testaments devised the same, or disposed thereof in such manner as such creditors have lost their said debts: . . .

[19] 11 Geo. 4 & 1 Wil. 4, c. 47. This Act largely consolidated prior legislation and was the basis for the *Real Property Assets Act*, R.S.B.C. 1897, c. 60, the predecessor to Part 9 of the current *Estate Administration Act*.

[20] 3 & 4 Will. 4, c. 104.

[21] 32 & 33 Vict., c. 46, commonly known as "Hinde Palmer's Act."

[22] *Statute of Frauds, 1677*, *supra*, n. 17, s. 10; *see King* v. *Ballett*, (1691) 2 Vern. 248, 23 E.R. 760. Section 11 of the Act provided, however, that the common law rule about false pleas by an heir (*see supra*, n. 8) had no application to a *cestui que trust* made liable under the Act.

[23] *An Act for Relief of Creditors against Fraudulent Devises*, (1691) *supra*, n. 18, *see Gelton* v. *Hancock*, (1743) 2 Atk. 427, 26 E.R. 658.

[24] Sections 125 and 126 are derived from the *Debts Recovery Act, 1830*, *supra*, n. 19, which replaced the *Fraudulent Devises Act*, *supra*, n. 18.

[25] *Administration of Estates Act, 1833*, *supra*, n. 20. This legislation, however, provided that specialty creditors had priority over simple creditors.

[26] *Administration of Estates Act, 1869*, *supra*, n. 21.

and 130 of the *Estate Administration Act*[27] and section 11 of the *Law and Equity Act*.[28]

## D. Section 132

Confusion can often result from the retention of obsolete statutory provisions. Section 132 of the *Estate Administration Act* is a case in point. The current version of the section dates from the 1911 Revised Statutes and does not tell the uninitiated reader a great deal:

> **132.** Where an action or other proceeding under this Act for the payment of debts, or any other purpose, is commenced or prosecuted by or against an infant under the age of 19 years, either alone or together with another person, the action or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any such action or suit could, before July 16, 1830, be carried on or prosecuted by or against an infant.

The original version of the provision was section 10 of the English *Debts Recovery Act, 1830* and explained its purpose more clearly:

> **X.** And be it further enacted, That from and after the passing of this Act, where any Action, Suit, or other Proceeding for the Payment of Debts, or any other Purpose, shall be commenced or prosecuted by or against any Infant under the Age of Twenty-one Years, either alone or together with any other Person or Persons, the Parol shall not demur, but such Action, Suit, or other Proceeding shall be prosecuted and carried on in the same Manner and as effectually as any Action or Suit could before the passing of this Act be carried on or prosecuted by or against any Infant, where, according to Law, the Parol did not demur. [emphasis added]

Before this section was enacted, a creditor could proceed against an infant who received real property under a will. Proceedings against an infant who received real property on an intestacy, however, were stayed until the infant came of age.[29] This rule was called a "parol demurrer." Section 10 of the *Debts Recovery Act, 1830* abolished the rule, so that a creditor's rights were the same whether the infant received real property by will or on an intestacy. The origin of the parol demurrer is to be found in the system of feudal tenures.[30] The rule had ceased to have any rational basis long before its abolition in 1830.

Section 132 provides, however, that proceedings against an infant are governed by the law before July 16, 1830. This section, consequently, resurrects the law on parol demurrers. The error crept into the legislation in the 1911 Revised Statutes.[31] The rule had a short afterlife, however, as the descent of property to heirs was abolished less than fifteen years later. Subject to one unimportant exception,[32] there have been no infant (or adult) heirs in British Columbia for many years.

## E. Evolution in the Law of Estate Administration

It was noted earlier that in the late seventeenth century there were two possible routes for legislative reform regarding a creditor's right to look to a deceased's real property. The first approach, and the one which was in fact

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[27] Section 130 was originally introduced in British Columbia by the *Administration Act Amendment Act, 1907*, S.B.C. 1907, c. 17, s. 2.

[28] R.S.B.C. 1979, c. 224, originally *An Act to abolish preferences amongst creditors in the administration of estates of deceased persons*, S.B.C. 1887, c. 13.

[29] *Creed* v. *Colville*, *supra*, n. 7; *Plasket* v. *Beeby*, (1804) 4 East 485, 102 E.R. 917.

[30] *Plasket* v. *Beeby*, *ibid.* at 919 *per* Lord Ellenborough C.J. and *per* Lawrence J.

[31] R.S.B.C. 1911, c. 4, s. 124, derived from the *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 11; *cf. Stewart* v. *Kimberley*, (1986) 70 B.C.L.R. 183, 186-8 (C.A.) *per* Lambert J.A. discussing the interpretation of revised statutes.

[32] *Infra*, n. 39.

originally adopted, was to provide a creditor with remedies against the person receiving the property by will or on an intestacy.

England adopted this approach in legislation enacted between 1677 and 1869. British Columbia enacted legislation based on these English reforms in 1897; it is now found in Part 9 of the *Estate Administration Act*.

Ironically, in the same year British Columbia enacted this legislation, England adopted an entirely different solution. The administration of real property was assimilated to that of personal property. Real property vested in the personal representative so that it was available to satisfy the deceased's debts and liabilities before it was transferred to his successors.[33]

The new approach was adopted by British Columbia in 1921[34] and is now contained in sections 6(2) and 90 to 93 of the *Estate Adminstration Act*.[35]

For a few years after 1921, the provisions now contained in Part 9 continued to have a very limited residual application in those situations where a creditor claimed payment after the personal representative had distributed the debtor's land to those beneficially entitled to it.[36] This residual effect was all but obliterated, however, by a second major change in the law. In 1925, British Columbia altered the rules governing the descent of real property upon an intestacy.[37] Before 1925, land passed to the heir; personal property passed to the next of kin. The *Administration Act Amendment Act, 1925*[38] removed this distinction between real and personal property. The estate of a person who dies intestate is dealt with as a whole and (after administration) passes to the statutory next of kin. The heir no longer has any beneficial interest in an intestate's land, except to the extent that he may receive an interest as a statutory next of kin.[39]

The legislative reforms discussed above, have removed the need to retain sections 122-127, 129, 131 and 132.

The Commission recommends that:

*1. Sections 122-127, 129, 131 and 132 of the* Estate Administration Act *be repealed.*

A personal representative may not be aware of an outstanding debt. What rights does an unpaid creditor have once the deceased's property is distributed? Part 9 of the *Estate Administration Act* provides a creditor with a remedy where land has been distributed to persons entitled under the deceased's will. There is, however, no need to retain any of the sections of Part 9 for even this limited purpose:[40]

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[33] *Land Transfer Act, 1897, supra*, n. 15.

[34] *Supra*, n. 2.

[35] *Ibid.*

[36] *See, e.g., Worthington & Co. v. Abbott*, [1910] 1 Ch. 588, although the creditor would have obtained the same result relying on equitable remedies discussed *infra* n. 40.

[37] A similar change occurred in England at the same time: *Administration of Estates Act, 1925*, 15 Geo. 5, c. 23, ss. 45-6.

[38] S.B.C. 1925, c. 2, s. 4. The provisions of that Act, as amended, now form ss. 94-112 of the *Estate Administration Act*.

[39] There is still one minor situation in which the heir at law may become legally, though not beneficially, interested in the real property of his ancestor. Section 90 of the *Estate Administration Act* states that all real property shall vest in the personal representative of the deceased. Where there is an executor under a will, this person obtains title immediately upon the death of the testator. His title does not depend on a grant of probate: *Woolley v. Clark*, (1822) 5 B. & Ald. 744; 106 E.R. 1363. Where a person dies intestate (or without naming an executor in his will) he has no personal representative until one is appointed by a court. Although a grant of administration relates back to the time of death, (*Estate Administration Act*, s. 5), there is nonetheless a hiatus until the letters of administration are granted. As noted above, the common law remedied this problem with respect to personal property. It vested temporarily in the local bishop. Section 3 of the *Estate Administration Act* now vests title to personal property in either the Supreme Court or, where appropriate, the relevant County Court. The Act is silent about the location of title to an intestate's real property prior to a grant of administration. Case law under the analogous statutory provisions in England makes it clear that title to an intestate's real property temporarily vests in the heir: *Re Griggs*, [1914] 2 Ch. 547, 552 *per* Lord Cozens-Hardy M.R. The continued vesting of land in the heir cannot, however, cause any genuine difficulties since he cannot have himself registered as the owner of the land. Sections 244 and 245 of the *Land Title Act*, R.S.B.C., c. 219, require a grant of probate or letters of administration before a transmission of the land can be registered at a land title office.

[40] *Harrison v. Kirk*, [1904] A.C. 1, 7 *per* Lord Davey (H.L.).

> . . . the Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, where the estate had been distributed either out of court or in court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiarie, or the next of kin who derive title from the deceased testator or intestate. In that case, no doubt, equitable defences may be made to the claim.

This equitable right first developed with respect to personal property distributed before the personal representative had satisfied all of a deceased's debts. When the administration of land was assimilated to that of personal property, this right was extended to cover claims against a recipient of real or personal property. Advertising for creditors pursuant to section 38 of the *Trustee Act* protects the personal representative from liability but does not affect the creditor's right to look to the recipient of estate property.[41]

## F. Execution Against a Deceased's Land

At common law, even where a creditor could assert remedies against the person who received the deceased debtor's real property, the real property could not be sold to satisfy the creditor's claims. The property was made available to the creditor, and rents and profits derived from the property were applied to satisfy the creditor's claim.[42]

In those cases where equity had jurisdiction, land could be sold and the proceeds applied to satisfy the debt owed the creditor. Procedural difficulties, however, often arose since the land vested in the deceased's successors on his death. Legislation was enacted to resolve these problems.[43] It provided that the person who received land by will or on an intestacy was a trustee of the land.[44] The court was given the power to discharge a contingent interest of an unborn person.[45] The court was also given power to deal with problems that arose where the recipient of property, because he had a limited estate, such as a life interest,[46] or was an infant,[47] could not execute a valid conveyance to the purchaser in a court ordered sale. Section 128 of the British Columbia *Estate Administration Act* and sections 83 and 84 of the *Trustee Act* are based on this English legislation.

The need for this legislation was also removed by vesting a deceased's real property in his personal representative for the payment of debts and liabilities. Moreover, problems of this nature are also dealt with by more general provisions.[48]

The Commission recommends that:

2. *Section 128 of the* Estate Administration Act *and sections 83 and 84 of the* Trustee Act *be repealed.*

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[41] *Clegg* v. *Rowland*, (1866) L.R. 3 Eq. 368; *Hunter* v. *Young*, (1879) 4 Ex. D. 256 (C.A.).

[42] *See Davy* v. *Pepys*, *supra*, n. 8.

[43] *Trustee Act, 1850*, 13 & 14 Vict. c. 60, s. 29; *Debts Recovery Act, 1830*, *supra*, n. 19, ss. 11 and 12; *see Wood* v. *Beetlestone*, (1854) 1 K. & J. 213, 69 E.R. 434 (Ch.).

[44] *Trustee Act, 1850*, *ibid.*

[45] *Ibid.*

[46] *Debts Recovery Act, 1830*, *supra*, n. 19, s. 12.

[47] *Ibid.*, s. 11.

[48] *Trustee Act*, *supra*, n. 1, ss. 48, 58 and 81; *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 34; and Rule 43 of the *Rules of Court*. As presently worded, s. 128 of the *Estate Administration Act* might seem also to apply to execution proceedings taken under s. 84 of the *Court Order Enforcement Act* against land of a deceased debtor. However, prior to completion of administration by the personal representative, a beneficiary has at best an inchoate interest in the land; he is not "seised or possessed of the land." The beneficiary under a specific gift has an inchoate right to the property. Residuary legatees and statutory next of kin, however, have no interest in any specific asset in the estate. Their only right is for the due administration of the estate. *See Minister of National Revenue* v. *Fitzgerald*, [1949] S.C.R. 453; *Sudeley* v. *Attorney General*, [1897] A.C. 11 (H.L.). *See also* J.H.G. Sunnucks, ed., *Williams and Mortimer on Executors, Administration and Probate* (15th ed., 1970) 849. Section 128 therefore has no application. Moreover, s. 84(2) of the *Court Order Enforcement Act* specifically deals with this situation by requiring notice to be served on any person "to whom the interest of the deceased in the land . . . has passed."

Section 85 of the *Trustee Act* refers to section 128 of the *Estate Administration Act*. When section 128 is repealed, section 85 of the *Trustee Act* should be revised to remove that reference.

The Commission recommends that:

*3. The reference to section 128 of the* Estate Adminstration Act *be deleted from section 85 of the* Trustee Act.

## G. Specialty and Simple Contract Debts: Section 130

Before 1869, creditors with a specialty debt binding on the deceased's heirs had priority over other specialty creditors and all simple contract creditors in an estate administration. This rule, however, applied only to legal assets.[49] With respect to equitable assets, specialty and simple contract creditors ranked equally.[50] The rule was of some significance since most assets were classified as legal. The priority of specialty creditors in the administration of an estate was abolished by statute in England in 1869.[51] This legislation was initially picked up by British Columbia[52] in 1887 and is now section 11 of the *Law and Equity Act*. Inexplicably, in 1907 the British Columbia legislature enacted this provision a second time.[53] The 1907 provision is now section 130 of the *Estate Administration Act*.

Neither provision need be retained. In the context of estate administration, the issue of priority between specialty and simple contract creditors only arises when the estate is insolvent. In that case, section 114(1) of the *Estate Administration Act* lists the order in which debts are to be paid and concludes:

> **114.** (1) (i) all other claims accepted by the legal personal representative of the deceased shall be paid rateably and without preference.

This provision removes any priority of a specialty creditor over a simple contract creditor where an estate is not sufficient to meet all debts.[54]

The Commission recommends that:

*4. Section 130 of the* Estate Administration Act *and section 11 of the* Law and Equity Act *be repealed.*

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[49] *Supra*, n. 10.

[50] Halsbury, *Statutes of England*, (1929) vol. 8, 323n.

[51] *Supra*, n. 21.

[52] *Supra*, n. 28.

[53] *Supra*, n. 27.

[54] If read literally, s. 114 has application only where a particular claim has been accepted by the personal representative; the personal representative is under a duty, however, to accept all just claims.

## CHAPTER III CONCLUSION

### A. Summary

Part 9 of the *Estate Administration Act* deals with the remedies of an estate creditor against a person who receives land from a deceased debtor by will or on an intestacy. These remedies were built upon a legal foundation which was dismantled in the 1920's. Real property now passes through the hands of the deceased's personal representative and is available for the payment of debts in the same manner as is personal property. Part 9 of the *Estate Administration Act* consists almost entirely of provisions which became obsolete more than sixty years ago. There is no reason to retain these provisions.

The work on Part 9 of the *Estate Administration Act* has heightened our awareness that a variety of provisions in the Act have not kept pace with developments in the general law and practice of estate administration. The fact that Part 9 has remained on the statute book for so many years after it ceased to perform any useful function illustrated the need for the present study of that legislation.

This Report forms a discrete, albeit small, part of our continuing review of the law on wills and estates. We have already dealt with a number of topics in this area[1] and are actively working on others.

### B. List of Recommendations

In this Report, the Commission has recommended that:

1. *Sections 122-127, 129, 131 and 132 of the* Estate Administration Act *be repealed.* **(Page 12)**
2. *Section 128 of the* Estate Administration Act *and sections 83 and 84 of the* Trustee Act *be repealed.* **(Page 13)**
3. *The reference to section 128 of the* Estate Adminstration Act *be deleted from section 85 of the* Trustee Act. **(Page 14)**
4. *Section 130 of the* Estate Administration Act *and section 11 of the* Law and Equity Act *be repealed.* **(Page 14)**

### C. Acknowledgments

The subject of this Report is uncontroversial and, for that reason, contrary to the Commission's usual practice, a prior Working Paper soliciting comment was not circulated.

We wish to express our gratitude to J. Bruce McKinnon, a Legal Research Officer to the Commission. Mr. McKinnon conducted the research for this project and, subject to the direction of the Commission, prepared this Report.

ARTHUR L. CLOSE
MARY V. NEWBURY
LYMAN R. ROBINSON
PETER T. BURNS

March 13, 1987

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[1] *See Annual Report 1985-86* (LRC 86).

# APPENDICES

## APPENDIX A

This Appendix contains the text of Part 9 (sections 122 — 132) of the *Estate Administation Act*. Each section is followed by notes arranged according to the following format:

1. (a) original enactment in British Columbia
   (b) English enactment from which (a) was adopted
   (c) original English enactment, if different from (b)
2. purpose of the provision
3. miscellaneous comments

***Estate Administration Act***
R.S.B.C. 1979, c. 114

**122.** When a person dies seised of or entitled to an estate or interest in land or other real estate which he has not by his last will charged with or devised subject to the payment of his debts, the same shall be assets to be administered in the courts of equity for the payment of the just debts of the person, as well debts due on simple contract as on specialty. The heirs at law, customary heir or devisee of the debtor are liable to all the same suits in equity at the suit of any of the creditors of the debtor, whether creditors by simple contract or by specialty. The heir at law or devisee of a person who died seised of freehold estates was, before August 23, 1833, liable to in respect of the freehold estates at the suit of creditors by specialty in which the heirs were bound.

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 2.
   (b) The *Administration of Estates Act, 1833*, 3 & 4 Will. 4, c. 104, as am. by *The Administration of Estates Act, 1869*, 32 & 33 Vict., c. 46. (This latter statute was also picked up as a separate provision in British Columbia; see the discussion in the text).
2. Before 1833, an heir or devisee was liable (to the extent that he had inherited land from the deceased debtor) only for specialty debts of the deceased binding on the heir. The concept of what constituted "equitable assets" was broadened by this section (see Appendix B for original section). As a result, any person receiving real estate from a deceased was responsible for any specialty or simple debt owed by the deceased. See the text for further discussion.
3. A significant grammatical infelicity was introduced into this section in the 1979 Revised Statutes. The last two sentences should be one sentence connected by "as".

**123.** All wills and testamentary limitations, dispositions or appointments made by a person concerning any land or any rent, profit, term or charge out of it, of which person at the time of his death is seised in fee simple, in possession, reversion or remainder, or has power to dispose of by his last will or testament, shall be deemed, as against any person and his heirs, successors, personal representatives and assignees with whom the person making the will or testament, limitation, disposition or appointment has entered into a bond, covenant or other specialty binding his heirs, to be fraudulent and absolutely void and of no effect, notwithstanding any pretence, colour, feigned or presumed, consideration or another matter or thing to the contrary.

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 3.
   (b) *Debts Recovery Act, 1830*, 11 Geo. 4 & 1 Will. 4, c. 47, s. 2.
   (c) *Fraudulent Devises Act, 1691*, 3 & 4 Wil. & Mar., c. 14, s. 2.
2. Before 1691, a creditor could look to the deceased's land only if it passed on an intestacy. Debtors who used a will to dispose of their land were able to defeat or hinder their creditors. This provision renders a devise in a will void to the extent that it affects a creditor of a specialty debt binding on the debtor's heirs.

**124.** In the cases before mentioned every creditor may bring his action of debt or covenant on the bonds, covenants and specialties against the heir and heirs at law of the obligor, covenantor and the devisee or the devisee of the first mentioned devisee jointly, by virtue of this Act. The devisee is liable and chargeable for a false plea pleaded by him, in the same manner as an heir should have been for a false plea pleaded by him, or for not confessing the land descended to him.

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 4.
   (b) *Debts Recovery Act, 1830*, 11 Geo. 4 & 1 Will. 4, c. 47, s. 3.
   (c) *Fraudulent Devises Act, 1691*, 3 & 4 Will. & Mar. c. 14, s. 3.

2. This section gives the creditor of a specialty debt binding on the heirs a right of action jointly against the heir and the devisee of the land. Normally the only land liable for the debt was that which had been inherited from the debtor. An heir who falsely denied that he had inherited land, however, caused his own property to be liable for payment of the deceased's specialty debts. Devisees were also subject to the rule concerning false pleas.

**125.** Where there is not an heir at law against whom, jointly with the devisee, a remedy is given by this Act, a creditor to whom relief is given by this Act may bring his action of debt or convenant against the devisee solely and the devisee is liable for a false plea.

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 5.
   (b) *Debts Recovery Act, 1830*, 11 Geo. 4 & 1 Will. 4, c. 47, s. 4.
2. This section allows a creditor to proceed against the devisee alone, in those situations where there is no heir liable under the legislation.

**126.** Where there has been or is a limitation, appointment, devise or disposition, concerning any land for the raising or payment of a real and just debt or a portion or sum of money, for a child of any person, in pursuance of a marriage contract or agreement in writing bona fide made before the marriage, they shall be in full force, and the land may be held and enjoyed by the person, his heirs, personal representatives and assignees, for whom the limitation, appointment, devise or disposition was made, and by his trustee, his heirs, personal representatives and assignees, for the estate or interest as shall be so limited or appointed, devised or disposed, until the debt or portion is raised, paid and satisfied, anything in this Act notwithstanding.

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 6.
   (b) *Debts Recovery Act, 1830*, 11 Geo. 4 & 1 Will. 4, c. 47, s. 5.
2. This section provides that section 123 does not apply where land has been devised either for the payment of debts or for the raising of money on behalf of a child pursuant to a marriage contract.
3. This section covers, *inter alia*, the situation where a testator has devised his real property subject to a charge, or trust, for payment of his debts. Even if only the income from the devised property is to be used to pay the debts, the will is outside the operation of section 123: *Linyard* v. *Earl of Derby*, (1783) 1 Bro. C.C. 312, 28 E.R. 1153.

**127.** Where an heir at law is liable to pay the debts or perform the covenants of his ancestors in regard of land descended to him, and sells, alienates or makes over the land before an action brought or process sued out against him, the heir at law is answerable for the debts or covenants, in an action or actions of debt or covenant, to the value of the land sold, alienated or made over, in which cases all creditors shall be preferred as in actions against executors and administrators. That execution shall be taken out on a judgment so obtained against the heir, to the value of the land, as if they were his own proper debt or debts, except that land, bona fide alienated before the action brought, is not liable to the execution.

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 7.
   (b) *Debts Recovery Act, 1830*, 11 Geo. 4 & 1 Will. 4, c. 47, s. 6.
   (c) *Fraudulent Devises Act, 1691*, 3 & 4 Will. & Mar., c. 14, s. 5.
2. Before 1691, an heir who disposed of land before proceedings were commenced avoided liability at common law for the deceased's debts. Section 127 provides that the heir remains liable to the value of the land.

**128.** Where the court directs the sale of land for the payment of the debts of a deceased person, every person seised or possessed of the land, or entitled to a contingent right in it, as heir, or under the will of the deceased debtor, shall be deemed to be so seised or possessed or entitled on a trust within the meaning of the *Trustee Act*. The court may make an order wholly discharging the contingent right, under the will of the deceased debtor, of any unborn person.

1. (a) *Trustees and Executors Act*, R.S.B.C. 1897, c. 187, s. 58.
   (b) *Trustee Act, 1850*, 13 & 14 Vict., c. 60, s. 29.
2. This section applies where a court of equity orders the sale of a deceased's land for the payment of his debts. It dates from the time when land did not pass through the hands of a personal representative but went directly to the devisee under a will or to the heir upon an intestacy. The provision makes the heir or devisee a trustee of the land and allows the court to discharge a contingent right of an unborn devisee. It thus facilitates the sale of land for the payment of debts.

**129.** Where an action on a specialty is brought against the heir, he may plead that he has received no land by descent or has no assets in his hands at the time of the action brought against him, notwithstanding anything in this Act. The plaintiff in the action may reply that he had land from his ancestor before the action brought, and if, on the issue joined, it is found for the

plaintiff, the jury shall inquire of the value of the land so descended, and judgment shall be given and execution shall be awarded; but if judgment is given against the heir by confession of the action, without confessing the assets descended, or on proceedings in lieu of demurrer or for want of a plea, it shall be for the debt and damage, without a writ to inquire of the land so descended.

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 8.
   (b) *Debts Recovery Act, 1830*, 11 Geo. 4 & 1 Will. 4, c. 47, s. 7.
   (c) *Fraudulent Devises Act, 1691*, 3 & 4 Will & Mar., c. 14, s. 6.
2. This provision sets out certain rules of pleading to reflect the changes brought about by section 127 and makes a consequential amendment to the law concerning false pleas by an heir (discussed above under section 124)

**130.** In the administration of the estate of a person who dies on or after July 1, 1907, no debt or liability of the person is entitled to any priority or preference by reason only that it is secured by or arises under a bond, deed or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of the person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of the deceased person, whether the assets are legal or equitable; but this Act does not prejudice or affect a lien, charge or other security which a creditor may hold or be entitled to for the payment of his debt.

1. (a) *Administration Act Amendment Act, 1907*, S.B.C. 1907, c. 17, s. 2.
   (b) *The Administration of Estates Act, 1869*, 32 & 33 Vict., c. 46, s. 1.
2. At law, a creditor with a specialty debt binding on the debtor's heirs had priority over other debts. (The priority did not exist at equity). This section purports to remove the priority which had, in fact, been removed by identical legislation in the 1880's. The legislation is discussed in the text of the Report.

**131.** Every devisee made liable by this Act is liable and chargeable in the same manner as the heir at law by force of this Act, notwithstanding the land devised to him is alienated before the action is brought

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 9.
   (b) *Debts Recovery Act, 1830*, 11 Geo. 4 & 1 Will 4, c. 47, s. 8.
   (c) *Fraudulent Devises Act, 1691*, 3 & 4 Will. & Mar., c. 14, s. 7
2. This section makes section 127 applicable to devisees.

**132.** Where an action or other proceeding under this Act for the payment of debts, or any other purpose, is commenced or prosecuted by or against an infant under the age of 19 years, either alone or together with another person, the action or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any such action or suit could, before July 16, 1830, be carried on or prosecuted by or against an infant.

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 11.
   (b) *Debts Recovery Act, 1830*, 11 Geo. 4 & 1 Will. 4, c. 47, s. 10. (But see Chapter II for a discussion of how the current version of section 132 unintentionally reverses the effect of the 1830 provision).
2. The purpose of the original version of this section was to abolish the rule (in force until 1830) that an action against an infant heir was stayed until the heir came of age. A 1911 amendment to this section inadvertently reversed the effect of the original provision.

# APPENDIX B

***Administration of Estates Act, 1833***

3 & 4 Will. 4, c. 104

[The original long title was
*An Act to render Freehold and Copyhold Estates Assets for the Payment of Simple and Contract Debts*]

Whereas it is expedient that the Payment of the Debts of all Persons should be secured more effectually than is done by the Laws now in force; be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act, when any Person shall die seised of or entitled to any Estate or Interest in Lands, Tenements, or Hereditaments, Corporeal or Incorporeal, or other Real Estate, whether Freehold, Customaryhold, or Copyhold, which he shall not by his last Will have charged with or devised subject to the Payments of his Debts, the same shall be Assets to be administered in Courts of Equity for the Payment of the just Debts of such Persons, as well Debts due on Simple Contracts as on Specialty; and that the Heir or Heirs at Law, Customary Heir or Heirs, Devisee or Devisees of such Debtor, shall be liable to all the same Suits in Equity at the Suit of any of the Creditors of such Debtor, whether Creditors by Simple Contracts or by Specialty, as the Heir or Heirs at Law, Devisee or Devisees of any Person or Persons who died seised of Freehold Estates was or were before the passing of this Act liable to in respect of such Freehold Estates at the Suit of Creditors by Specialty in which the Heirs were bound: Provided always, that in the Administration of Assets by Courts of Equity under and by virtue of this Act all Creditors by Specialty in which the Heirs are bound shall be paid the full Amount of the Debts due to them before any of the Creditors by Simple Contract or by Specialty in which the Heirs are not bound shall be paid any Part of their Demands.

# APPENDIX C

This Appendix contains the text of Sections 83 and 84 of the *Trustee Act*. Each section is followed by notes arranged according to the following format:

1. (a) original enactment in British Columbia
   (b) English enactment from which (a) was adopted
2. purpose of the provision
3. miscellaneous comments

***Trustee Act***
R.S.B.C. 1979, c. 414, ss. 83 and 84

**83.** Where a suit is instituted in any court of competent jurisdiction for the payment of debts of a person deceased, to which an heir or devisee may be subject or liable, and the court decrees the estates liable to any of the debts to be sold for satisfaction of the debts, and by reason of the infancy of any heir or devisee an immediate conveyance cannot, as the law at present stands, be compelled, then the court shall direct and, if necessary, compel the infant to convey the estates so to be sold (by all proper assurances in the law) to their purchaser, and in the manner the court thinks proper. The infant shall make the conveyance accordingly, and it is as valid and effectual to all intents and purposes as if the infant was at the time of executing it of the full age of 19 years.

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 12.
   (b) *Debts Recovery Act, 1830*, 11 Geo. 4 & 1 Will. 4, c. 47, s. 11
2. Where a court of equity has ordered that land of a deceased debtor be sold, this section permits an infant to execute a conveyance of the land to the purchaser.

**84.** When land, tenements or hereditaments are devised in settlement by a person whose estate, under this Act, by law or by his will, is liable for payment of any of his debts, and by the devise is vested in a person for life or other limited interest with a remainder, limitation or gift over, which may not be vested, or may be vested in some person from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree is made for the sale of it for the payment of the debts or any of them, the court by whom the decree is made may direct the tenant for life, or other person having a limited interest, or the first executory devisee of it, to convey, release, assign, surrender or otherwise assure the fee simple or other the whole interest so to be sold to the purchaser, or in the manner the court thinks proper. The conveyance, release, surrender, assignment or other assurance is as effectual as if the person who makes and executes it were seised or possessed of the fee simple or other whole estate so to be sold.

1. (a) *Real Property Assets Act*, R.S.B.C. 1897, c. 60, s. 11
   (b) *Debts Recovery Act, 1830*, 11 Geo. 4 & 1 Will. 4, c. 47, s. 12.
2. Like section 83 of the *Trustee Act*, section 84 addresses a problem that may arise in executing a conveyance on a court ordered sale. Where the property is held under a life estate (or other limited interest) or an executory devise, the life tenant, or the first executory devisee, may convey the entire fee simple to a purchaser in a court ordered sale.
3. The British Columbia *Real Property Assets Act* did not pick up a modification to section 12 of the English *Debts Recovery Act, 1830* introduced by the *Debts Recovery Act, 1848*, 11 & 12 Vict., c. 87.

# APPENDIX D

*Trustee Act*

R.S.B.C. 1979, c. 414, ss. 58, 81 and 85

**58.** When any land is subject to a contingent right in an unborn person or class of unborn persons, who on coming into existence would, in respect of it, become seised or possessed of the land on a trust, the court may make an order which shall wholly release and discharge the land from the contingent right in the unborn person or class of unborn persons, or may make an order which shall vest in any person the estate which the unborn person or class of unborn persons would, on coming into existence, be seised or possessed of in the land.

**81.** When a decree or order has been made by the Supreme Court, or by any other court of competent jurisdiction in the Province, directing the sale of land for any purpose whatever, every person seised or possessed of the land, or entitled to a contingent right in it, being a party to the action or proceeding in which the decree or order has been made, and bound by it, or being otherwise bound by the decree or order, shall be deemed to be so seised, possessed or entitled (as the case may be), on a trust within the meaning of this Act. In that case, the Supreme Court, if it thinks it expedient to carry the sale into effect, may make an order vesting the land or a part of it for the estate the court thinks fit, either in a purchaser or in any other person the court directs; and that order has the same effect as if the person so seised, possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of the land for that estate.

**85.** Every order made or to be made, being or purporting to be made under section 128 of the *Estate Administration Act* or this Act by the court, and duly passed and entered, is a complete indemnity to all companies, associations and persons whatsoever for an act done pursuant to it. It is not necessary for the company, association or person to inquire concerning the propriety of the order, or whether the court had jurisdiction to make it.

# APPENDIX E

***Law and Equity Act***
R.S.B.C. 1979, c. 224, s. 11

**11.** In the administration of the estate of every person dying on or after January 1, 1889, no debt or liability of the person is entitled to any priority or preference by reason merely that it is secured by or arises under a bond, deed or other instrument under seal or is otherwise made or consituted a specialty debt. All the creditors of the person shall be treated as standing in equal degree and be paid accordingly out of the assets of the deceased person, whether the assets are legal or equitable, notwithstanding any statute or other law to the contrary. This Act shall not prejudice or affect any lien, charge or other security which any creditor may hold or be entitled to for the payment of his debt.

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